



DEPARTMENT OF EDUCATION

34 CFR Part 300

[Docket ID ED-2022-OSERS-0052]

RIN 1820-AB82

Assistance to States for the Education of Children with Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend regulations under Part B of the Individuals with Disabilities Education Act (Part B of IDEA or the Act) that govern the Assistance to States for the Education of Children with Disabilities program, including the Preschool Grants program.

Specifically, the Secretary proposes to amend the IDEA Part B regulations to remove the requirement for public agencies to obtain parental consent prior to accessing for the first time a child's public benefits or insurance (e.g., Medicaid, Children's Health Insurance Program (CHIP)) to provide or pay for required IDEA Part B services. As there are no comparable consent requirements prior to accessing public benefits for children without disabilities, the removal of this consent requirement would align public benefits consent requirements for children with

disabilities to those for children without disabilities and ensure equal treatment of both groups of children.

DATES: We must receive your comments on or before **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at [regulations.gov](http://www.regulations.gov). However, if you require an accommodation or cannot otherwise submit your comments via [regulations.gov](http://www.regulations.gov), please contact the program contact person listed under FOR FURTHER INFORMATION CONTACT. The Department will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Please go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under "FAQ."

Note: The Department's policy is to generally make comments received from members of the public available for public viewing at www.regulations.gov. Therefore, commenters should include in their comments only

information about themselves that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Rebecca Walawender, U.S. Department of Education, 400 Maryland Ave., SW, room 5130, Potomac Center Plaza, Washington, DC 20202. Telephone: (202) 245-7399. Email: Rebecca.Walawender@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this proposed regulation. To ensure that your comments have maximum effect in developing the final regulation, we urge you to clearly identify the specific section or sections of the proposed regulation that each of your comments addresses.

Directed Questions: As currently drafted, the proposed regulatory language would retain the requirement to include in the written notification to parents the “no cost” provisions in 34 CFR 300.154(d)(2)(i) through (iii). We invite your comments on the following questions relating to the written notification related to the “no cost” provisions in § 300.154(d)(2)(i) through (iii),¹ which will

¹ IDEA requires that special education, related services and supplementary aids and services are provided at no-cost to a child or their family. IDEA calls this a Free Appropriate Public Education in § 300.17. The no cost provisions in 300.154(d)(2)(ii) through (iii) are unallowable examples where accessing public benefits would incur costs to the family, including co-pays, deductibles, and increased premiums.

continue to remain in effect and would not be changed by this proposed regulatory action:

1. Should the "no cost" provisions in § 300.154(d)(2)(i) through (iii) continue to be included in the written notification to parents prior to accessing the child's public benefits or insurance for the first time and annually thereafter?

2. Should the "no cost" provisions in § 300.154(d)(2)(i) through (iii) be included in the written notification to parents prior to accessing the child's public benefits or insurance for the first time, but removed in annual written notifications thereafter?

3. Should the "no cost" provisions in § 300.154(d)(2)(i) through (iii) be removed from the written notification to parents altogether?

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from this proposed regulation. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities. The Department also welcomes comments on any alternative approaches to the subjects addressed in the proposed regulation.

During and after the comment period, you may inspect public comments about this proposed regulation by accessing Regulations.gov.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed regulation. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background:

Prior Actions

Since IDEA's reauthorization in 2004, the Department has on multiple occasions examined the administrative steps that must be taken when a public agency seeks to access a child's or parent's public benefits or insurance (such as Medicaid) to pay for services required under IDEA Part B for children with disabilities. In 2006, the Department enacted IDEA Part B regulations that required a public agency to obtain parental consent each time the agency seeks access to a child's or parent's public benefits or insurance. 34 CFR 300.154(d)(2)(iv). See 71 FR 46539, 46772 (Aug. 14, 2006). This regulatory provision was further clarified through nonregulatory guidance. Because

the regulation appeared to require consent every time a service was provided (if, for example, a child's individualized education program (IEP) included a service covered by public insurance that was provided multiple times each week, then consent would be required each time the service was delivered), in 2007 the Department advised that a public agency alternatively could obtain parental consent under § 300.154 for a specific time period (e.g., annual consent). Office of Special Education Programs (OSEP) Memo 07-10.² Further, the Department noted that consent was required under § 300.154 if the public agency sought to use such benefits for additional hours of service (if, for example, the IEP was revised or extended) or sought to charge different amounts for the services. OSEP Memo 07-10.

In 2013, the Department revised § 300.154 to its current form. 78 FR 10525 (Feb. 14, 2013). As currently written, the provision requires a one-time initial parental consent after the public agency has given written notification of its intent to access the child's or parent's public benefits or insurance, and annual written notification thereafter. 34 CFR 300.154(d)(2)(iv) and (v). Such consent is to permit the use of public benefits or insurance to seek the appropriate reimbursement for the

2

<https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/osep07-10interpretationof34cfr300154.pdf>.

appropriate service. Id. The consent requirement in 34 CFR 300.154(d)(2) is separate from, and in addition to, the parental consent requirements under both Part B of the IDEA (34 CFR 300.622) and the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g and 34 CFR 99.30), which require the participating agency (usually the local educational agency (LEA)) to obtain parent consent to disclose personally identifiable information (PII) to a public benefits or public insurance agency for billing purposes. This consent requirement is separate from and does not change the parental consent required for the initial evaluation to determine whether a child is a child with a disability under IDEA (34 CFR 300.300(a)), consent for the initial provision of special education and related services under IDEA (34 CFR 300.300(b)), consent for the reevaluation of a child with a disability (34 CFR 300.300(c)), or consent to disclose PII to a State entity for Medicaid billing under either FERPA (34 CFR part 99) or IDEA (34 CFR 300.622).

In the 2013 rulemaking, several commenters asked the Department to remove the consent process to reduce administrative burden and increase access to Medicaid reimbursement for services required under IDEA. At that time, the Department acknowledged the importance of reducing funding barriers and streamlining consent requirements specific to IDEA Part B, and ultimately added

both the initial consent requirement (removing the requirement that consent be obtained each time access to public benefits or insurance is sought) and the parental notification requirement in § 300.154(d). Based on the Department's oversight and administration of IDEA since that time as well as continued stakeholder concerns regarding the barriers this requirement imposes on accessing public benefits and insurance,³ and for the reasons described below, the Secretary no longer believes the initial consent requirement in § 300.154 is necessary, given the existing regulatory protections in IDEA Part B and FERPA that protect the privacy rights of parents and students as well as the "no-cost" protections in the notification provisions in § 300.154. The Secretary thus proposes to rescind the Department's current requirements in § 300.154(d)(2)(iv) and revise the requirements in current § 300.154(d)(2)(v).

Administration's Policy Priorities

The Biden-Harris Administration has established a clear policy goal to increase access to health and mental health services. The Administration's mental health strategy is focused on three elements: strengthening system capacity, connecting people to care, and creating a

³ See Obtaining Parental Consent to Bill Medicaid: An Unnecessary, Time-Consuming and Emotionally Fraught Process for Districts and Parents, a report jointly issued by the School Superintendents Association, the Association of Educational Services Agencies and the National Alliance for Medicaid in Education. https://www.aasa.org/docs/default-source/advocacy/medicaid-parental-consent-2023.pdf?sfvrsn=f8d706b2_3.

continuum of support.⁴ Increasing access to needed health and mental health services that can be delivered to students at school is a key element of this policy goal.

Consistent with section 11003 of the Bipartisan Safer Communities Act and Executive Orders 14009, Strengthening Medicaid and the Affordable Care Act and 14070 Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage, the Biden-Harris Administration is committed to strengthening and increasing access to school-based health services. Section 11003 of the Bipartisan Safer Communities Act requires the Department, along with the U.S. Department of Health and Human Services, to collaborate to eliminate barriers to the delivery of Medicaid services to enrolled children. Pub. L. 117-159. To this end, the Departments are jointly developing policies that will increase access to school-based health services for children who are enrolled in Medicaid.

Now, more than ever, ensuring access to school-based Medicaid services for children with disabilities is essential. Recent research from the Substance Abuse and Mental Health Services Agency (SAMHSA) shows that individuals of low-socioeconomic status are more vulnerable during and after a disaster (e.g., pandemics or

⁴ See The White House, "Fact Sheet: President Biden to Announce Strategy to Address Our National Mental Health Crisis, as Part of Unity Agenda In His First State of The Union" (Mar. 1, 2022). <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/fact-sheet-president-biden-to-announce-strategy-to-address-our-national-mental-health-crisis-as-part-of-unity-agenda-in-his-first-state-of-the-union/>.

catastrophic weather events), including by living in fragile housing, having difficulty accessing resources after a disaster, and experiencing trauma both during and after a disaster.⁵ Our Nation's youth generally are experiencing unprecedented mental health challenges. As described in the Biden-Harris Administration's mental health strategy, "Our youth have been particularly impacted as losses from COVID and disruptions in routines and relationships have led to increased social isolation, anxiety, and learning loss. More than half of parents express concern over their children's mental well-being."⁶

Children with disabilities are disproportionately and significantly more affected by these challenges. Data in the Department's report on Supporting Child and Student Social, Emotional, Behavioral and Mental Health Needs⁷ indicate that, compared to students without disabilities, children and students with disabilities experience higher rates of mental health challenges, including anxiety, depression, academic-related stress, suicidal ideation,

⁵ Substance Abuse and Mental Health Services Agency, Disaster Technical Assistance Center Supplemental Research Bulletin, "Greater Impact: How Disasters Affect People of Low Socioeconomic Status" (July 2017). Available at: https://www.samhsa.gov/sites/default/files/dtac/srb-low-ses_2.pdf.

⁶ Id. The Unity Agenda also noted that, "[i]n 2019, one in three high school students and half of female students reported persistent feelings of sadness or hopelessness, an overall increase of 40 percent from 2009. Emergency department visits for attempted suicide have risen 51 percent among adolescent girls."

⁷ U.S. Department of Education, Office of Special Education and Rehabilitative Services, "Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs," (2021). Available at: <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>.

suicide attempts, non-suicidal self-injury, and peer victimization. Fragmented delivery systems and policy and funding gaps make this mental health crisis more challenging to address. Id. The report recommends establishing an integrated framework of educational, social, emotional, and behavioral health support for all and to leverage policy and funding.

Medicaid Funding in Schools

Medicaid is one of our Nation's primary sources of funding for health and mental health services for children with and without disabilities, covering approximately 41.6 million children and 42 percent of all childbirths,⁸ and funding health and mental health services in schools. Under Medicaid's Early Periodic Screening Diagnosis and Treatment benefit, eligible children can receive comprehensive primary health, mental health and behavioral health services.⁹ In 2014 guidance to State Medicaid Directors (SMDs), the Centers for Medicare & Medicaid Services (CMS) clarified that Medicaid payment is permitted for any covered services provided to Medicaid-eligible beneficiaries as long as they are delivered by Medicaid-

⁸ See December 2022 Medicaid & CHIP Enrollment Data Highlights <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html#:~:text=92%2C340%2C585%20individuals%20were%20enrolled%20in,individuals%20were%20enrolled%20in%20CHIP> and National Vital Statistics Reports Volume 70, Number 2, March 23 Births: Final Data for 2019 (cdc.gov).

⁹<https://www.medicaid.gov/federal-policy-guidance/downloads/sbscib081820222.pdf>.

qualified providers.¹⁰ That guidance was intended to facilitate access to quality healthcare services within school settings and improve the health of communities, and ensure that Medicaid reimbursement is available for covered services that are provided to Medicaid beneficiaries, regardless of whether there is any charge for the service to the beneficiary or the community at large.¹¹

Many children with disabilities receiving services under IDEA are also enrolled in Medicaid due to their disability status and/or based on their family income. Children with disabilities and special health care needs are more likely to be low-income, and those covered by Medicaid are more likely to have greater health care needs than those who are covered by private insurance.¹² Further, the COVID-19 pandemic has limited access to critical services for children with disabilities and other vulnerable populations.¹³ To meet the Administration's goal

¹⁰ SMD# 14-006. Available at: <https://www.medicaid.gov/federal-policy-guidance/downloads/smd-medicaid-payment-for-services-provided-without-charge-free-care.pdf>.

¹¹ SMD# 14-006. Available at: <https://www.medicaid.gov/federal-policy-guidance/downloads/smd-medicaid-payment-for-services-provided-without-charge-free-care.pdf>.

¹² Williams, Elizabeth & Musumeci, MaryBeth (2021). "Children with Special Health Care Needs: Coverage, Affordability, and HCBS Access." Kaiser Family Foundation. Available at: <https://www.kff.org/medicaid/issue-brief/children-with-special-health-care-needs-coverage-affordability-and-hcbs-access/>.

¹³ U.S. Department of Education, Office of Special Education and Rehabilitative Services, "Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs," (2021). Available at: <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>. See also: U.S. Department of Education, Office for Civil Rights. "Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students," (2021). Available at:

of increasing access to health and mental health services, it is imperative to specifically address barriers to accessing funding and Medicaid services for low-income children with disabilities.

IDEA requires public agencies to make a free appropriate public education (FAPE) available to all eligible children with disabilities, which means, among other things, that the services identified on a child's IEP must be provided at public expense and without charge to the child or the child's parents. A public agency may access a child's or parent's public benefits or insurance to pay for IDEA Part B services, but this requires the agency to share PII about the child in question with the agency or entity managing the benefits. IDEA contemplates that public agencies should, in appropriate circumstances, access public benefits and insurance programs to help pay for services required under Part B, while reaffirming the requirement that such services be delivered at no cost to parents.

Equal Treatment of Children With and Without Disabilities

Medicaid regulations do not require Medicaid agencies or providers (such as schools) to obtain consent from the beneficiary or family member prior to exchanging the individual's information for a purpose directly connected to the administration of the Medicaid State plan, which

includes billing Medicaid for providing services to the beneficiaries. 42 CFR 431.306. Instead, the act of enrolling a child or parent in Medicaid serves as consent for Medicaid providers to access public benefits for billing purposes. For children with disabilities, however, regardless of Medicaid, FERPA (34 CFR 99.30) and IDEA (34 CFR 300.622) require parental consent before disclosing PII, and the transfer of PII is often a necessary step in billing Medicaid. In addition, for Medicaid-eligible children with disabilities, current IDEA requirements in § 300.154(d)(2)(iv) and (v) require schools to secure parental consent to bill Medicaid before seeking reimbursement for services identified on a child's IEP. This last regulatory requirement does not exist to access Medicaid for services provided to Medicaid-eligible children without disabilities. Rescinding 34 CFR 300.154(d)(2)(iv) and revising 34 CFR 300.154(d)(2)(v), while maintaining existing PII disclosure protections in FERPA (34 CFR 99.30) and IDEA (34 CFR 300.622), would ensure equal treatment of Medicaid beneficiaries, reduce administrative burden, and eliminate a barrier to reimbursement.

Reimbursement of health care costs through school-based Medicaid claims can be an important source of financial support for public agencies providing school-based services. According to the Medicaid Financial

Management Report, in FY 2021,¹⁴ \$4,280,950,805 was expended for school-based services and funded through Medicaid's Medical Assistance Program, and an additional \$1,699,326,212 in school-based administration costs were reimbursed through Medicaid. By increasing the ability of public agencies to bill Medicaid for school-based services, this proposed change would increase the overall level of financial support for public agencies, and would increase the funding available to State and local educational agencies to provide important services and supports to students under the IDEA.

Section 300.154. Methods of Ensuring Services

Statute: 20 U.S.C. 1412(a)(12) requires, as a condition of eligibility for an IDEA Part B grant award, each State to provide assurances that it has a statute, regulation, an interagency agreement or other appropriate written mechanism for interagency coordination that is in effect to identify the financial responsibility of non-educational public agencies for providing services required to ensure FAPE to children with disabilities, and that the financial responsibility of those agencies, including the State Medicaid agency and other public insurers of children with disabilities, precedes the financial responsibility of the LEA or the State agency responsible for developing the child's IEP. This requirement is consistent with IDEA's

¹⁴ <https://www.medicaid.gov/medicaid/financial-management/downloads/financial-management-report-fy2021.zip>.

payor of last resort requirements in IDEA sections 612(e) and 640(c) and section 1903(c) of the Medicaid statute, which state that as between Federal IDEA funds and Medicaid, Medicaid is the payor of first resort.

Current Regulations: Section 300.154(d)(2)(iv) requires a public agency to obtain a one-time consent from the parent, after providing written notification, before accessing the child's or the parent's public benefits or insurance for the first time. This consent must specify PII that may be disclosed, the purpose of the disclosure, and the agency to which the disclosure may be made. See §§ 99.30 and 300.622. The consent also must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for IDEA Part B services.

Section 300.154(d)(2)(v) requires that the written notification to the child's parents be consistent with § 300.503(c)--that is, be in a language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent (unless it is clearly not feasible to do so). The notification must be provided before accessing the child's or the parent's public benefits or insurance for the first time, prior to obtaining the one-time parental consent, and annually thereafter. The written notification must include: (1) a statement of the parental consent

provisions in § 300.154(d) (2) (iv) (A) and (B); (2) a statement of the "no cost" provisions under § 300.154(d) (2) (i) through (iii) informing the parent that the agency may not require parents to enroll in Medicaid, may not require parents to incur an out-of-pocket expense incurred in filing a claim for services, and may not use a child's Medicaid benefits if that use would decrease lifetime coverage or any other insured benefit, result in the family paying for services that would otherwise be covered by Medicaid and that are required for the child outside of the time the child is in school, increase premiums or lead to discontinuation of benefits or insurance, or risk loss of eligibility for home and community-based waivers; (3) a statement that the parents have the right to withdraw consent to disclosure of their child's PII to the agency responsible for the administration of the State's public benefits or insurance program at any time; and (4) a statement that refusal to provide consent or withdrawal of consent to disclose PII to the agency responsible for the administration of the State's public benefits or insurance program does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

Proposed Regulations: We propose to rescind current § 300.154(d) (2) (iv), which would remove the requirement for

parental consent prior to accessing a child's or parent's public benefits or insurance for the first time.

We propose to revise the current parental notification requirements in § 300.154(d)(2)(v). The revised provision would continue to state that the required parental notification must be consistent with § 300.503(c), and it would still include a statement of the "no cost" provisions in current § 300.154(d)(2)(i) through (iii). The proposed revision of § 300.154(d)(2)(v) would modify the reference to parental consent, to confirm that parental consent to disclose PII is required separately under §§ 99.30 and 300.622 and that parents retain all applicable privacy rights under those provisions. Section 300.154(d)(2)(v) would be further revised to no longer require the following two statements: a statement that the parents have the right to withdraw consent to disclose their child's PII to the agency responsible for the administration of the State's public benefits or insurance program at any time; and a statement that refusal to provide consent or withdrawal of consent to disclose PII to the agency responsible for the administration of the State's public benefits or insurance program does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. It is important to note that nothing in this proposed regulation will change or diminish parents' rights to consent to an

evaluation under IDEA or the initial provision of special education and related services under IDEA.

Reasons: In light of the challenges described in the "Background" section, and consistent with the Administration's priorities, the Secretary believes that the Department should eliminate regulatory provisions that present unnecessary barriers to public agencies seeking Medicaid reimbursement for school-based Medicaid services provided to children receiving special education and related services under IDEA Part B, particularly where such barriers do not exist for similarly situated children without disabilities. The one-time consent provision in § 300.154(d) (2) (iv) represents such a barrier. As discussed further below, that provision slows down or may prevent public agencies from accessing available funding for needed IDEA services without providing any additional protection to families.

Federal regulations do not prohibit public agencies from accessing a child's or parent's public benefits or insurance to pay for special education and related services if such use would not result in additional costs to the parent or reduce benefits to the child. To maximize public agencies' access to Federal Medicaid funds, the proposed regulations would no longer require the public agency to obtain parental consent prior to accessing a child's or parent's public benefits or insurance for the first time,

other than the consent to release PII that already is required consistent with part 99 and § 300.622. Public agencies would continue to be required to provide written notification to parents prior to accessing a child's or parent's public benefits or insurance for the first time and annually thereafter. The timing of the written notification to the parent would continue to be at the agency's discretion, so long as the first such written notification is given *before* the public agency seeks access to the child's or parent's public benefits or insurance for the first time.

These changes would align Medicaid billing for children with and without disabilities, while retaining important protections for children and families. The privacy rights of children with disabilities remain important to the Department, and, as noted above, the Department would retain written consent protections under FERPA and the IDEA Part B regulations that require a public agency to obtain written consent before disclosing PII from a child's education records. See 34 CFR 99.30 (FERPA), 300.622 (IDEA). In addition, parents remain protected by the IDEA "no-cost" regulations that prohibit public agencies from requiring parents to enroll in public benefits or insurance in order for their child to receive FAPE and using public benefits or insurance to pay for special education and related services if such use would

result in additional specific costs to the parent or reduce benefits to the child. See § 300.154(d)(2)(i) through (iii). Finally, we propose to retain an annual notification requirement in § 300.154(d)(2)(v), which would include written notification of the “no-cost” provisions described above. Preserving such notification would ensure that the child’s parents are continually informed of their rights and protections under the IDEA.

The proposed amendment to § 300.154(d)(2) would help address unequal funding access for certain Medicaid services that are available to both children with disabilities and children without disabilities (as covered services may be delivered to all Medicaid-enrolled students). As noted above, CMS’ 2014 guidance clearly indicated that Medicaid funds could be used to pay for services furnished to Medicaid-eligible students, even if the services were provided within a school at no cost to such students. The IDEA one-time consent provision within current § 300.154(d)(2)(iv) creates a barrier to accessing Medicaid for IDEA-eligible children that does not exist for non-IDEA-eligible children. The Secretary believes it is inappropriate to maintain such a barrier in light of the Biden-Harris Administration’s goals of increasing access to health and mental health services for all youth.

Reducing the administrative burden for all parties is consistent with the Administration’s goals and the

Bipartisan Safer Communities Act's directive to increase access to Medicaid funding for health services in schools. With this change, parents would continue to retain their privacy rights and schools would have greater access to an important funding stream to support the provision of FAPE to eligible children with disabilities.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed the proposed regulation under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental,

public health and safety, and other advantages;
distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing the proposed regulation only on a reasoned determination that its benefits would justify its costs. We are issuing this proposed regulation after conducting a policy review per the Bipartisan Safer Communities Act and determining that the proposed changes closely adhere to policy goals of the Biden-Harris Administration. In choosing among alternative regulatory approaches, we selected the approach that maximizes net

benefits. Based on the analysis that follows, the Department believes that this regulation is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. The potential benefits for LEAs include reduced administrative burden associated with the removal of the additional Federal consent requirement, and increased revenue for schools to enhance programs for students with disabilities and the provision of IDEA services as a result of leveraging Medicaid funding.

Discussion of Costs and Benefits

The Department has reviewed these proposed regulations to assess their potential impact. Based on the information provided by States in the Federal fiscal year 2020 State

Performance Plan/Annual Performance Report,¹⁵ the Department determined that approximately 524,652 children were found eligible for special education in school year 2020-2021. Data indicates that 56 percent of children with disabilities are covered through Medicaid or the Children's Health Insurance Program. Therefore approximately 293,805 of these children are determined to be eligible for Medicaid in the 2020-2021 school year. As a result, we assume 524,652 new students will enroll in IDEA Part B each year, of which 293,805 would be eligible for Medicaid. As detailed further below, we estimate that the reduced administrative burden associated with the removal of IDEA Medicaid consent requirements would have an initial first-year cost of \$2,484,856 and initial first-year benefit of \$5,981,870. For the first ten years, the overall benefit to impacted agencies and individuals would be \$39,691,856 using a 7 percent discount rate and \$48,614,083 using a 3 percent discount rate. This estimate assumes that all 51 State educational agencies¹⁶ (SEAs) currently accessing Medicaid to pay for covered services utilize a joint form

¹⁵

<https://aspe.hhs.gov/sites/default/files/documents/77d7cc41648a371e0b5128f0dec2470e/aspe-childrens-health-coverage.pdf>.

¹⁶ Under Part B of the IDEA, there are 60 SEAs, which include the 50 States, the District of Columbia, Puerto Rico, the Bureau of Indian Education, the outlying areas (the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands), and the freely associated States (the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau). For the purposes of this regulatory impact analysis, we include only the 50 States and the District of Columbia, which represent the SEAs that access Medicaid to pay for covered services.

for requesting FERPA and IDEA parent consent to disclose PII under Part B of IDEA (\$ 300.622) and FERPA (\$ 99.30).

Costs:

We estimate that costs of this proposed rule to state educational agencies (SEAs) would account for \$60,792 of our total estimated first-year costs of \$2,484,856. We assume that an Education Administrator and lawyer from each SEA would require two hours each to read and understand the proposed rule. We estimate that the cost per SEA of these proposed regulatory changes would be no more than \$525, for a national cost of \$26,775. In addition, we assume that it would take no more than 3 hours per SEA for a lawyer to revise the joint SEA IDEA and FERPA consent forms; we estimate the cost of revising the consent form to be no more than \$427 per SEA, for a national cost of \$21,777. We assume it would take 2 hours for an Education Administrator to draft guidance to LEAs on the revisions to consent forms and impact on LEAs; we estimate the cost of providing guidance to SEAs to be \$240 per SEA, for a national cost of \$12,240. These estimates are calculated using average national wage rates for Education Administrators employed

by States of \$120.15¹⁷ and lawyers employed by State governments of \$142.34.¹⁸

We estimate that costs of this proposed rule to LEAs would account for \$2,424,064 of our total estimated first-year costs of \$2,484,856. We assume that, for each of the 17,824 LEAs,¹⁹ an Education Administrator would require 30 minutes and an Administrative Assistant from each LEA would require two hours to ensure LEA forms align with revised State forms. We estimate that the cost per LEA for ensuring that LEA consent forms align with revised SEA forms would be no more than \$136, for a national cost of \$2,424,064. These estimates are calculated using average national wage rates for education administrators employed by local governments of \$118.58²⁰ and administrative assistants employed by local governments of \$38.54.²¹

Benefits:

¹⁷ As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) with 100 percent loaded wage rate.

¹⁸ As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) with 100 percent loaded wage rate.

¹⁹ As reported in the National Center for Education Statistics, Common Core of Data Elementary/Secondary Information System table generator with data compiled from a district based table with the following filters applied: 2021-22 school year, 50 States plus Washington, DC, excludes records with missing values, and includes districts with enrollment greater than zero.

²⁰ As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) with 100 percent loaded wage rate.

²¹ As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) with 100 percent loaded wage rate.

Overall, the Department estimates the proposed regulations would result in cost savings of \$5,981,870 during the first year due to a reduction in time and effort on the part of both LEA staff and parents. We estimate that, as a result of this proposed rule, cost reductions to LEAs equal to \$4,924,172 and benefits to parents equal to \$1,057,698 during the first year. We assume that for each of the 293,805 new students eligible to receive services under Medicaid, Special Education Teachers and parents would benefit as a result of this proposed rule due to time saved resulting from the removal of IDEA requirements from standard Medicaid consent forms. We estimate a benefit to LEAs of \$16.76 per student, for a national benefit of \$4,924,172 for time saved (15 minutes saved for each eligible student), because it would take Special Education Teachers less time to explain and review the IDEA-specific sections of Medicaid consent forms. We estimate a benefit to parents of \$3.60 per student, for a national benefit of \$1,057,698, due to a reduction in time required for a parent to review and understand the IDEA-specific sections of Medicaid consent forms. These estimates are calculated using the average national wage rate for special education teachers employed by local governments of \$67.05²² and, for

²² As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) with 100 percent loaded wage rate.

parents, the 25th percentile of the average national wage rate for all occupations of \$14.40.²³

Elsewhere in this section under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Alternatives Considered

The Department reviewed and assessed various alternatives to the proposed regulations. The Department considered removing both the consent requirement and the notice provision. The Department also considered maintaining the current regulations requiring the one-time consent prior to the first time an LEA sought to bill a child or parent's public benefits or insurance and the notification provision prior to and an annually thereafter. The Department determined that removing the one-time consent and retaining the annual notification was the most efficient option to decrease administrative burden, ensure equal treatment of Medicaid-eligible children with disabilities and their nondisabled peers, and maintain transparency for parents.

Clarity of the Regulation:

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand. The

²³ As reported in the national Compensation Survey, May 2021 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm#00-0000) without loading.

Secretary invites comments on how to make the regulation easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulation clearly stated?
- Does the proposed regulation contain technical terms or other wording that interferes with its clarity?
- Does the format of the proposed regulation (use of headings, paragraphing, etc.) aid or reduce its clarity?
- Would the proposed regulation be easier to understand if we divided it into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 106.9 Dissemination of policy.)
- Could the description of the proposed regulation in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulation easier to understand? If so, how?
- What else could we do to make the proposed regulation easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section.

Regulatory Flexibility Act Certification

The Secretary certifies that the proposed regulation would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

The small entities that this proposed regulatory action would affect are school districts or other public agencies seeking to access public insurance and benefits to reimburse services required to be provided to students with disabilities under IDEA Part B. The Secretary believes that the costs imposed on public agencies by the proposed regulation would be limited to the paperwork burden related to preparing the appropriate parental notice and that the benefits of implementing this proposal would outweigh any costs incurred by those agencies. As described in the Discussion of Costs and Benefits section of this document, the Department estimates that the proposed regulations would result in cost savings.

The Department invites comment from members of the public regarding our estimates and whether this proposed rule may have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Proposed newly redesignated § 300.154(d)(iv) contains an information collection requirement, although the information collected is not submitted to the Department. Under the PRA, the Department has submitted a copy of this section to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB

control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations, we will display the control number 1820-0600 assigned by OMB to any information collection requirement proposed in this NPRM and adopted in the final regulations.

Under proposed newly redesignated § 300.154(d)(2)(iv), each LEA must provide a written notification to parents prior to accessing a child's or parent's public benefits or insurance for the first time and annually thereafter. We assume that each SEA would amend the standard notice that its LEAs can use and that it would take an average of about 10 hours to amend the notice for each of the 51 grantees currently accessing Medicaid to pay for covered services under Part B of IDEA, representing a total burden of 510 hours. We further estimate that as an uppermost bound it would take an additional 8,912 hours for LEA staff to obtain and modify an existing model notification, based on not more than 30 minutes for each of the 17,824 LEAs. However, we expect that most LEAs would simply use the model from its SEA. Therefore, we estimate the one-time burden for the first year of implementation of this notification requirement to be not more than 9,422 hours.

With the addition of the burden to SEAs and LEAs associated with proposed § 300.154, the total annual record keeping and notification burden for 1820-0600 is estimated to be approximately 383,751 hours for the 75,527 separate responses from SEAs and LEAs.

The following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections the Department will submit to OMB for approval and public comment under the PRA.

Regulatory section	Collection information	OMB Control Number and estimated burden
§ 300.154(d)	Requires that parents receive a written notification prior to LEAs accessing a child's or parent's public benefits or insurance for the first time and annually thereafter.	Information collection 1820-0600 "State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act." The burden would be 9,422 hours.

We have prepared an Information Collection Request (ICR) for this collection. This proposed collection is identified as proposed collection OMB control number 1820-0600. If you want to review and comment on the ICR, please follow the instructions listed below in this section. Please note that the Office of Information and Regulatory Affairs (OIRA) and the Department of Education review all comments posted at www.regulations.gov.

We consider your comments on this proposed collection of information in--

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Comments submitted in response to this document should be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting Docket ID Number ED-2022-OSERS-0052. Please specify the Docket ID number and indicate "Information Collection Comments" if your comment(s) relate to the information collection for this proposed rule. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Strategic Collections and Clearance Director, U.S. Department of Education, 400 Maryland Avenue SW, LBJ Room 6W201, Washington, DC 20202-8240. For further information contact ICDocketMgr@ed.gov.

Consistent with 5 CFR 1320.8(d), the Department is soliciting comments on the information collection through

this document. OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of the Department's specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between

the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulation does not have federalism implications.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available at no cost to the user at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs-education, Privacy, Private schools, Reporting and recordkeeping requirements.

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary of Education proposes to revise part 300 of title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

1. The authority citation for part 300 continues to read as follows:

Authority: 20 U.S.C. 1221e-3, 1406, 1411-1419, and 3474; Pub. L. 111-256, 124 Stat. 2643; unless otherwise noted.

2. Section 300.154 is amended by:

- a. Removing paragraph (d) (2) (iv);
- b. Redesignating paragraph (d) (2) (v) as paragraph (d) (2) (iv); and
- c. Revising newly redesignated paragraph (d) (2) (iv).

The revision reads as follows:

§ 300.154 Methods of ensuring services.

* * * * *

(d) * * *

(2) * * *

(iv) Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification to the child's parents, consistent with § 300.503(c), that includes--

(A) A statement confirming that parental consent to disclose personally identifiable information is required separately under 34 CFR 99.30 and 300.622 and that parents retain all applicable privacy rights under those provisions; and

(B) A statement of the "no cost" provisions in paragraphs (d)(2)(i) through (iii) of this section.

* * * * *